No. 43691-4-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

DIANE DUMOND and GREG DUMOND,
single individuals,
Appellants,

v.

VIETNAMESE BAPTIST CHURCH OF TACOMA, INC., a Washington Corporation; and CHARLES L. KELLY, JR. and JANE DOE KELLY, as a Marital Community,
Respondents.

BRIEF OF APPELLANTS

Daniel N. Cook
Barbara McInvaille
Attorneys for Appellants

Faubion, Reeder, Fraley & Cook, P.S.
5920 100th Street SW, Suite 25
Lakewood, WA 98499
(253) 581-0660

Law Office of Robert Helland
960 Market St.
Tacoma, WA 98402
(253) 572-2684

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ASSIGNMENTS OF ERROR

1. The trial court erred by finding that the use of the alley by the Dumonds and their predecessors in interest was based upon a tacit agreement among the effected property owners to keep the alley open for use by the property owners whose property abuts the alley, and other non-property owners who sporadically utilized the alley.

   Finding of Fact 13.

2. The trial court erred by concluding that the DuMonds failed to satisfy the statutory requirements of prescriptive easement acquisition.

   Conclusion of Law 2.

3. The trial court erred by concluding that the Dumonds' (or their predecessors in interests') prior use of the alley in question was not hostile or legally adverse to the Defendant owners of the land (or their predecessors in interest).

   Conclusion of Law 2, 4, 5.

4. The trial court erred by concluding that the Dumonds' (or their predecessors in interests') prior use of the alley was by express or implied permission.

   Conclusion of Law 2, 4, 5.

5. The trial court erred by concluding (finding) that the use of the property in question was permissive in nature by neighborly courtesy and understanding.

   Conclusion of Law 3, 4, 5.[1]

[1] Appellants note that the determination of whether such use is adverse or permissive is generally a question of fact. *See, e.g., Drake v. Smersh*, 122 Wn. App. 147, 152, 89 P.3d 726 (2004). Findings of fact labeled as conclusions of law will be treated as findings of fact when challenged on appeal. *See Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

6. The trial court erred by concluding that the Defendants are entitled to judgment specifying that they have clear title to the property in question, unburdened by any prescriptive easement.

Conclusion of Law 6.

7. The trial court erred by ordering that the Dumonds are permanently enjoined from further use of the property in question for access and egress to their property.

Conclusion of Law 7.

8. The trial court erred by assessing damages against Gregory Dumond for tearing down the fences erected across the property in question by Defendants.

Conclusions of Law 17 and 18, Judgment (June 16, 2012).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. Did the trial court err by ruling that the Plaintiffs failed to satisfy the statutory requirements of prescriptive easement acquisition?

Assignments of Error 1-5.

II. Did the trial court err by ordering that Defendants have clear title, unburdened by any prescriptive easement, to the property in question, permanently enjoining the Dumonds from use of the property in question?

Assignments of Error 6-7.

III. Did the trial court err by entering judgment against Gregory Dumond for damages done in conjunction with his removal of Defendants' fence?

Assignment of Error 8.

STATEMENT OF THE CASE

IDENTIFICATION OF PARTIES

Plaintiffs Greg Dumond and Diane Dumond are children of Cecil and Margret DuMond. Cecil and Margret Dumond purchased the real property commonly known as 6032 South Warner Street, Tacoma, Washington, in 1959. 1 RP 20. Hereinafter, this property is referred to as the "Dumond home" for ease of reference. Greg and Diane Dumond inherited the property after their parents passed away. 1 RP 18.

The Defendants, Charles and Joanne Kelly ("Kelly"), own the real property located at 3415-3419 South 62nd Street, Tacoma, Washington. CP 11-12. Defendants Kelly obtained the property in June 2006. See Ex. 1.

The Defendant, Vietnamese Baptist Church of Tacoma, Inc. ("Church"), is a Washington non-profit organization operating its principal place of business in Washington at the property located at 6042-6048 South Warner Street, Tacoma, Washington. CP 16-17. Defendant Church obtained the property in December 2003. See Ex. 7.

IDENTIFICATION OF PROPERTIES

The Dumond home is located on South Warner Street in Tacoma. The block is bounded on the north by South 60th Street, on the south by South 62nd Street, to the west by Puget Sound Avenue, and to the east by South Warner Street. The properties facing Puget Sound Avenue and the properties facing South Warner Street adjoin each other at the rear. See Ex. 23.

The strip of land in dispute is referred to herein as the "Alley" for ease of reference. The disputed Alley is 10 to 12 feet wide, and runs north and south roughly down the center of the property line at the rear of the respective residences on Puget Sound Avenue and South Warner Street. 1 RP 36. See Ex. 24 (admitted for illustrative purposes) for identification of the disputed Alley.

The property owned by the Church is two houses south of the Dumond house on the South Warner side of the Alley. The property owned by Kelly is three houses south of the Dumond home on the Puget Sound side of the Alley. See Ex. 24 (admitted for illustrative purposes) for identification of the location of the Church and Kelly properties relative to the Dumond home.

VISUAL APPEARANCE OF A CLEAR AND OBVIOUS ALLEY FROM 1959 THROUGH 2006

In 1959 when Cecil and Margaret Dumond purchased the property, all roads in the immediate area, including Warner Street at the front of the Dumond home and the Alley in the rear of the Dumond home, were unpaved, gravel surfaces. South Warner Street remained unpaved until sometime in the 1980s. 1 RP 27-28.

In 1959, there was (and still is today), an unpaved legal alley that appears on a plat map immediately north of the disputed strip of road referred to as the Alley in this case. In 1959, there was also (and is still today), an unpaved legal alley that appears on a plat map immediately south of the disputed strip of road referred to as the Alley in this case. From 1960 through 1978 the physical appearance of the legal north and south alleys was similar, if not identical to, the Alley. 1 RP 32-34, 134, 151, 163. It is undisputed that the physical appearance of the alleys on the blocks directly north and south of the Alley continued to appear in largely the same condition as the Alley in question through at least the year 2006. Finding of Fact 9, CP 456.

From 1960 through at least 1978 there was continuous vehicle traffic in the Alley. During that time frame there were distinct tire ruts

in the Alley. Any grass growing in between the tire ruts was kept low by the continuous vehicle traffic. 1 RP 32.

From 1960 through 2005 the brush and vegetation along both sides of the Alley were kept back by the continuous passage of vehicles through the Alley. Vehicle traffic was so continuous through 2005, no weed whacking or removal of vegetation was necessary.

Beginning in 2006, vehicle traffic decreased and Greg Dumond began to mow or weed whack along the sides of various portions of the Alley in addition to the portion behind the Dumond home to ensure his vehicles could pass through the Alley. 1 RP 54-55, 64. Subsequently, Diane Dumond and her son also mowed and weeded the Alley, including portions of the Alley behind homes other than the Dumond home. 1 RP 80-81, 142-145. Greg Dumond and his nephew Dominic (Diane Dumond's son) removed an abandoned mattress and occasionally removed other trash and debris from the Alley directly behind the Dumond home. They did not remove any debris from behind the neighboring yards. 1 RP 62, 69, 143-145.

The Dumonds and the general public continued to use the Alley through 2005. In 2000, when the property located two houses south of the Dumond home was purchased by Dr. Merritt Lawson, the Alley

still clearly appeared to be an obvious alley. 1 RP 174. In 2000, Dr. Lawson observed about two or three cars per day using the Alley during a five hour period he was at the property each day. 1 RP 75. The tire ruts and Alley roadway remained obvious and free of vegetation until 2006. 1 RP 35. The existence of an Alley roadway was evident from aerial photographs through at least 2006. See, Ex. 14 (aerial photograph of Alley from 1998); Ex. 15 (aerial photograph from 2002); and Ex. 16 (aerial photograph from 2006).

In August 2006 Robert Kahl observed the Alley was an obvious dirt roadway, with gravel on the sides and grass in the middle of the tire ruts, which he used without seeking permission from anyone. CP 409-11.

Even after fences were erected and reduced the amount of traffic, as of April 2012, the south end of the Alley still had beaten down tire tracks that indicated an obvious roadway. See, Ex. 22; 1 RP 117 (Darlene Mundy).

OPEN AND NOTORIOUS USE OF ALLEY FROM 1959 THROUGH 2006

After Cecil and Margret Dumond purchased the property in 1959, they tore down the single family dwelling that previously existed on the property and built a new single family dwelling (the

Dumond home). Construction of the Dumond home was completed in 1960. 1 RP 20-21. Building materials for construction of the Dumond home were delivered using the Alley. CP 95. The new Dumond home included a rear facing garage that opened to the Alley. 1 RP 21. There is no access to the rear facing garage except via the Alley. 1 RP 21, 25-26.

The Dumond family continuously used and drove on the Alley from 1960 through at least 1980. 1 RP 29 -31. Cecil Dumond (Greg and Diane Dumonds' father) used the Alley to drive to and from work several times a week from 1960 through 1973 or 1974. 1 RP 29. In addition to Cecil Dumond's use several times a week, the older Dumond siblings used the Alley three or four times a week ~~in~~ from 1962 through 1974. 1 RP 30-31. Greg Dumond personally drove on the Alley at least two times a week from 1972 through 1978. From 1973 through 1980 Diane Dumond drove on the Alley twice each day. 1 RP 74-75. Diane Dumond observed other vehicles using the Alley during that same period. 1 RP 75.

In addition to personally driving on the Alley during her teenage and young adult years, Diane Dumond was also physically present at the Dumond home almost every day from the period of

1981 through 2008. Diane Dumond was present at the Dumond home frequently because her mail had been delivered to the Dumond home her entire life and because she visited her mother there until her mother's passing. Diane's son also attended school around the corner from the Dumond home. 1 RP 72, 140. From 1980 through 2008 Diane Dumond used the alley at least two or three and sometimes as much as four times each week. 1 RP 76.

In January 2008, after her mother passed away, Diane Dumond moved back into the Dumond home and has lived there continuously since. 1 RP 71-72.

The Dumonds did not exclusively use the Alley. Several neighbors of the Dumonds used the Alley. 1 RP 39, 142. City garbage trucks used the Alley to pick up garbage from 1960 through 1978. 1 RP 32. The City garbage trucks also drove through the legal alleys that appear on the plat map on the blocks immediately north and south of the Dumond home. City garbage trucks would drive through all three of the alleys traveling north to south (or vice versa) without stopping, even though the Alley at issue here does not appear on a plat map. Finding of Fact 7, CP 456.

Cars driven by persons other than homeowners regularly used the Alley as well. 1 RP 73, 142, 176. Ron Brown lived in the block directly north of the Dumond home from 1962 to 1970. 1 RP 128; Ex. 28 (admitted for illustrative purposes). Ron Brown's home had a legal alley behind his house. He would "constantly" use the legal alley behind his house and travel south into and through the Alley, even though he did not live on property adjacent to the Alley, and even though the Alley was not shown on a plat map. He did this hundreds of times during the time he was in high school from 1964 through 1967. 1 RP 130-132. Even after he moved from the block directly north, from approximately 1973 or 1974 until 1980, Mr. Brown continued to use the Alley in question about once a week to visit a friend whose property included a rear facing garage on the Alley. 1 RP 134.

Louis Rougutt also lived in a house with a rear facing garage two houses north of the Dumond home from 1954 to 1974. 1 RP 150-151; Ex. 27 (admitted for illustrative purposes). Mr. Rougutt's father operated a TV repair shop out of that garage. Customers of the TV repair shop, who were not homeowners, regularly used the Alley. 1 RP 151-152.

Thomas Woolery lived three houses north of the Dumond home from 1964 to 1979. He played in the alley every day. He observed at least two cars each day including many driven by persons who started at one end of the Alley and drove all the way through without stopping at any property on the block. 1 RP 161, 171.

Dr. Merritt Lawson purchased the property two houses south of the Dumond home in February 2000. At that time, the Alley was still being used by non-homeowners. 1 RP 174-176

The trial court found that: the Dumonds' use of the property in question was open and notorious; it took place over a uniform route, and was continuous and uninterrupted for a period of at least ten years. The trial court further found that the use of the Alley by the Dumonds or their predecessors in interest was exercised with the knowledge of the Defendants or their predecessors in interest at a time when the Defendants or their predecessors in interest were able to assert their rights. Finding of Fact 16, CP 457.

FENCES AND DECREASING USE

In 2006, a fence blocking passage through the Alley was erected by a non-party property owner, referred to herein as the "Ridgley property", north of the Dumond home. 1 RP 39-40, 60, 62;

Finding of Fact 14, CP 456. The Dumonds continued to regularly use the southern part of the Alley. CP 87.

Beginning in 2007 the Defendants erected a series of fences over the southern portion of the Alley in 2007. 1 RP 58-60, 87-88; Finding of Fact 15, CP 456. At first the Defendant Church's fence included a gate wide enough to permit vehicle access through it to the Alley from the south. 1 RP 88-89, 148. This fence was not removed by the Dumonds. 1 RP 90, 149. Diane Dumond continued to use the Alley and opened and closed the gate to get through. 1 RP 88.

The gate large enough for a car to pass through was later replaced by the Church with a gate only large enough for a man to pass through. 1 RP 90, 148. The Dumonds had a car parked in their rear facing garage they could not get out after Defendant Church replaced the vehicle sized gate with a smaller gate. 1 RP 91. Greg Dumond removed the fence in order to get the car out but took care to only remove the portion of the necessary to allow a vehicle in and out and the remainder of the fence in place. 1 RP 48, 90-91.

In 2008 the Defendant Church rebuilt the fence across the alley blocking access entirely. 1 RP 58-59. Defendant Kelly built a fence blocking the Alley at about the same time as the Church's rebuilt fence

in 2008. 1 RP 50, 59, 86. In 2010 Greg Dumond removed both Defendants' fence to allow access to Alley. 1 RP 63-64, 82. When Greg Dumond removed the fence, he used care to do so in a manner that was not unnecessarily destructive and which preserved the fence panels for reuse by either Defendant wished to rebuild the fence set back far enough to accommodate the easement. 1 RP 51-53. The fence panels carefully preserved by Greg Dumond were available and used in Defendant's estimate regarding cost to rebuild the fence. 1 RP 52; Exhibit 4.

Prior to 2006 when the first fence was erected and blocked passage through the Alley to the north of the Dumond home, traffic in the Alley had remained relatively consistent. Finding of Fact 11, CP 456. In addition to the Dumonds' desired use of the Alley, Dr. Merritt Lawson used his rear facing garage through 2000. He still seeks to use it today. 1 RP 183-185. Between 1995 and 2012, Darlene Mundy used the Alley several times to receive appliances that were delivered to her home. 1 RP 122. Between 2003 and 2004, she used the Alley to remove an old car in her garage. 1 RP 116.

Use of the Alley diminished in 2006 because the fence to the north blocked the ability to travel the entire length of the Alley. 1 RP

146. But even after the fences went up the Dumonds and other homeowners continued to use the Alley. CP 87. Neighboring homeowner Darlene Mundy used the Alley in 2010 when her daughter moved in with her. 1 RP 118. Robert Kahl used the Alley in August 2006 (after the fence to the North was up) to park his RV at the rear of his house. CP 410, 418.

BELIEF THE ALLEY WAS A PUBLIC RIGHT OF WAY

No permission was ever expressly sought or given for the use of the Alley. Finding of Fact 13, CP 456, Line 11 (balance of Finding 13 is alleged error). The persons who utilized the Alley believed it was a public right of way for which no permission was needed and therefore, none was sought. 1 RP 37-39, 61 (Greg Dumond); 1 RP 92, 112 (Diane Dumond); 1 RP 116, 117 (Darlene Mundy); 1 RP 169 (Thomas Woolery); 1 RP 177- 178, 182-183 (Dr. Merritt Lawson in the year 2000); CP 410-411 (Robert Kahl in the year 2006).

In its oral ruling, the trial court observed: "It appears that people, neighbors who lived on the block and non-neighbors who drove through the so-called alley, acted on the belief this was a public right-of-way." CP 443. This comment was memorialized in the following Finding of Fact:

> In the 1960's and 1970's and into the 1980's, many property owners all along the alley way made regular use of the strip of land in question by traveling upon it. During the same period of time, city garbage trucks used the alley on a weekly basis to collect garbage from neighbors along the entire alley. To some degree, non-neighbors who owned no property in the alley treated the area of land in question as a public alley as well.

Finding of Fact 7, CP 456.

FINAL ORDERS

The trial court found there was a "tacit agreement" among the property owners affected by the Alley. Finding of Fact 13, CP 456, Line 12-15. Assignment of Error Number 1 addresses this "tacit agreement." There is no evidence of any such agreement in the record. Based upon the finding of this "tacit agreement," the court then concluded there was no hostile or legally adverse use. Conclusion of Law 2, CP 457. Assignments of Error Numbers 3 and 4 address the trial court's conclusion that use of the Alley was non-hostile and permissive. The trial court thus denied the Dumonds' request for prescriptive easement and entered Findings of Fact and Conclusions of Law in favor of Defendants in June 2012. CP 455 - 459.

A separate judgment was entered against Greg Dumond for the replacement costs of both Defendant's fences. CP 452-454. Plaintiffs contested the judgment for replacement costs because of the

existence of a prescriptive easement making removal of the fences justified and not wrongful. CP 389-391. Assignment of Error Number 8 addresses the trial court's judgment against Greg Dumond for the cost of the replacement fences.

The Dumonds timely filed this appeal.

ARGUMENT

I. THE TRIAL COURT ERRED BY RULING THAT THE PLAINTIFFS FAILED TO SATISFY THE STATUTORY REQUIREMENTS FOR ACQUISITION OF A PRESCRIPTIVE EASEMENT.

A. Standard of Review

The establishment of a prescriptive easement presents a mixed question of law and fact on appeal. *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P.2d 214 (1997).

Findings of fact are reviewed for support by substantial evidence in the trial record. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); *Lee*, 88 Wn. App. at 181. Substantial evidence is defined as "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true," thus determining whether the facts constitute a prescriptive easement as a matter of law. *Id.* If this standard is met, a reviewing

court will not substitute its judgment for the trial court's judgment, even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 314 P.2d 622 (1957).

Questions of law and conclusions of law are reviewed de novo. *See Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

B. Establishment of a Prescriptive Easement

It is true that prescriptive easements are not favored in the law. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). But a prescriptive easement may be established/acquired nonetheless by proof of use adverse and known to the owner, or by use conducted in an open, notorious and continuous manner for a period of ten years. *Id.*

More specifically, in order to establish prescriptive easement, the party claiming its existence must prove use of the subject property that is (and has been):

(1) open and notorious;
(2) over a uniform route;
(3) continuous and uninterrupted for 10 years;
(4) adverse to the owner of the land subjected to the prescriptive easement; and
(5) with the knowledge of the owner at a time when he was able to assert and enforce his rights.

Drake v. Smersh, 122 Wn. App. 147, 151, 89 P.3d 726 (2004).

Important here, successors in interest to a property at issue may claim a prescriptive easement that was fixed by the actions taken by their predecessors in interest to the property. *Northwest Cities Gas Co. v. Western Fuel Co. Inc., et al.*, 13 Wash.2d 75, 123 P.2d 771 (1942). In *Northwest Cities,* the Plaintiff's prescriptive easement rights were based upon actions of Plaintiff and Plaintiff's predecessor in interest between 1920 to 1936 even though the Defendant transferred the property in 1937 and suit was not brought until 1940. *Id.* at 82, 93. That is precisely the case here. The Dumonds' predecessors in interest fixed their prescriptive rights in the property long ago, between 1960 and 1980. When Defendant Church, in 2003, and Defendant Kelly, in 2006, acquired their properties, they took the property subject to the previously matured prescriptive right of Plaintiff Dumonds.

1. The Dumonds' use was open and notorious.

The trial court found that the use of the Alley was open and notorious. CP 457 (Finding of Fact 16). This finding is not challenged on appeal.

2. The use of the Alley was continuous and uninterrupted for at least 10 years.

The trial court found that the use of the Alley was continuous

and uninterrupted for at least 10 years. CP 457 (Finding of Fact 16). This finding is not challenged on appeal.

3. The use of the Alley was over a uniform route.

The trial court found that the use of the Alley was over a uniform route. CP 457 (Finding of Fact 16). This finding is not challenged on appeal.

4. The use of the Alley was with the knowledge of the Defendants at a time when the Defendants were able to assert and enforce their rights.

The trial court found that the use of the Alley was with the knowledge of the Defendants at a time when they were able to assert and enforce their rights. CP 457 (Finding of Fact 16). This finding is not challenged on appeal.

5. The prescriptive easement had been established long before the current parties/property owners took title to the properties in question.

A property owner is bound by the prescriptive easement acquired against a predecessor in interest. *See, e.g., Lee v. Lozier,* 88 Wn. App. 176, 186, 945 P.2d 214, (1997) (owner of dominant estate began prescriptive use of servient estate in 1981; servient estate sold in 1989; trial court established prescriptive easement even though successor owner of servient estate challenging easement had only owned property for two years of ten year prescriptive period); *see also,*

Northwest Cities Gas Co. v. Western Fuel Co. Inc., et al., 13 Wash.2d 75, 123 P.2d 771 (1942). (actions taken from 1920 to 1936 fixed rights to prescriptive easement even though party challenging prescriptive easement did not obtain title until 1937).

In this case, the record clearly shows that a prescriptive easement had been established by regular use for vehicle traffic for at least 10 years. Between 1960 and 1980, Greg and Diane Dumond, as well as their father and siblings, regularly drove in the Alley. 1 RP 29 (father - several times a week from 1960 through 1973 or 1974); 1 RP 30-31 (older Dumond siblings - three or four times a week from 1962 through 1974); 1 RP 31 (Greg at least two times a week from 1972 through 1978); 1 RP 74-75 (Diane twice each day from 1973 through 1980).

Not only did the Dumonds utilize the Alley from the time they acquired their property until the most recent fence was erected, but many of their neighbors similarly utilized the Alley. CP 456 (Finding of Fact 7 - 8). See also, 1 RP 26, 32 ("So from 1960 until 1978 when I moved out of the house, the alley was used pretty much constantly." "[T]hroughout my entire youth there was no grass growing in [the Alley] anywhere. There were tire ruts, a little grass in the middle, but it was always kept short by continual vehicle traffic knocking it

down." Testimony of Greg DuMond.). There were also as many as nine other properties along the disputed strip in the 1960s and 1970s with driveways and garages that opened and accessed the Alley." CP 456 (Finding of Fact 8).

The City of Tacoma also used the Alley as part of their garbage collection route from 1960 through at least 1978. CP 456 (Finding of Fact 7); 1 RP 32.

Therefore, by virtue of the continuous use for vehicle traffic in the 1960s and 1970s, the prescriptive easement had already ripened long before the time Defendants Kelly and Defendant Vietnamese Baptist Church acquired their respective properties in 2003 (Church) and 2006 (Kelly). See Ex. 1 (Kelly) and 7 (Church).

C. The trial court erred by concluding that the Dumonds failed to prove their use of the alley was legally adverse to the Defendants.

The trial court concluded:

> Plaintiffs Dumond have failed to satisfy the statutory requirements of prescriptive easement acquisition, in that the prior use by the Plaintiffs' [sic] or their predecessors in interest of the alley way in question was not hostile, or legally adverse to the Defendant owners of [the] land, or their predecessors in interest.

CP 458 (Conclusion of Law 2).

"Ill will" among the parties does not establish hostile or

adverse use of property. Instead, adverse use is shown by the claimant using the subject property as the true owner would use it, as opposed to possessing or using it subordinately to the true owner. *Id.*, citing *Malnati v. Ramstead*, 50 Wn.2d 105, 108, 309 P.2d 754 (1957); *Granston v. Callahan*, 52 Wn. App. 288, 293, 759 P.2d 462 (1988). This element was further explained by the Washington Supreme Court as follows:

> The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination.

Chaplin v. Sanders, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984).

The trial record clearly indicates that the Dumonds treated the property as their own. As many of their neighbors did, they built a garage that faced and is accessible only via the Alley. 1 RP 21, 25-26. The Dumonds testified that they regularly maintained the property by mowing and clearing weeds from the Alley. 1 RP 54-55, 64, 80-81, 142-145. They removed discarded furniture and debris from the property. 1 RP 62, 69, 143-145. Greg and Diane Dumond and their

parents and siblings parked her car by or in the rear facing garage, and utilized the Alley to drive to work or school and return home nearly every day for 20 years from 1960 to 1980. 1 RP 29-31, 74-75. Even after moving out of the Dumond House, from 1980 through 2008 Diane Dumond used the alley at least two or three and sometimes as much as four times each week. 1 RP 76. The Dumonds treated the Alley as their own. This evidence is uncontroverted.

There is nothing in the trial record that supports the trial court's finding that the Dumonds' use of the Alley was not legally adverse to the Defendants. The Dumonds have satisfied this element.

1. The Dumonds' use of the Alley was not with the express or implied permission of any other party.

The trial court erred by concluding that

> Until the year 2006, prior use of the alley way by Plaintiffs and Plaintiffs' predecessors in interest was by express or implied permission.

CP 458 (Conclusion of Law 2).

The trial court's conclusion that the Dumonds' use of the Alley was based upon a presumption of permissive use is not supported by the record, nor is it supported by law.

Our Supreme Court has observed that "the claim in a

prescriptive easement case is merely to use [that] could have been prevented by the rightful owner." *Dunbar v. Heinrich*, 95 Wn.2d 20, 27, 622 P.2d 812 (1980).

Permissive use is shown by "evidence of a close, friendly relationship or a family relationship between the claimant and the property owner." *Granston v. Callahan*, 52 Wn. App. 288, 749 P.2d 462 (1988) (citing Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash L. Rev. 53, 75 (1960)).

In *Drake v. Smersh*, Division One of our Court of Appeals found no evidence in the trial record that the claimant had ever asked for or received permission to use the subject property as his own. He did use the property as his own nonetheless. The Court further found the trial record contained no evidence to show any relationship between the claimant and the property owner from which permissive use could be inferred. 122 Wn. App. 147, 154, 89 P.3d 726 (2004). Therefore, Division One affirmed the trial court's judgment in favor of a prescriptive easement.

In this case, the Defendants argued at trial, and the trial court found, that because the use of the Alley was not hostile (because it had not been challenged), the Dumonds' use of the Alley was by "tacit agreement" and was therefore "permissive." CP 457 (Finding of Fact 13), CP 458 (Conclusion of Law 2). There is nothing in the record to support

this Finding or Conclusion. To the contrary, "unchallenged use [of the subject property] for the prescriptive period is a circumstance from which an inference may be drawn that the use was adverse." *Cuillier v. Coffin*, 57 Wn.2d 624, 627, 358 P.2d 958 (1961) (Emphasis added).

In this case, the Dumonds used the Alley as though it was their own, never seeking permission from anyone to use it well beyond the statutory period of ten years. They believed the property was a public right of way – an alley. They did not have a close personal relationship with the Defendants (or any of their successors in interest) from which permissive use could be inferred. Therefore, this finding is not supported by substantial evidence and was error.

2. The Dumonds use of the Alley was not permissive in nature by neighborly courtesy and understanding.

The trial court further erred by concluding that

> [P]rior to 2006, the use of the property in question was permissive in nature by neighborly courtesy and understanding.

CP 458 (Conclusion of Law 3).

The neighborly courtesy doctrine is summarized in *Roediger v. Cullen* as follows: "The law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use of a path, or road, across his uncultivated land, resulting in no injury to

him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the land owner is called upon 'to go to law' to protect his rights." *Roediger v. Cullen*, 26 Wn.2d 690, 709, 175 P.2d 669 (1946) (citing *Weaver v. Pitts*, 191 N. C. 747, 133 S. E. 2 (1926)). But the neighborly courtesy doctrine is limited and it is impermissible for a court to apply a "presumption" of neighborly courtesy. *Drake v. Smersh*, 122 Wn. App. 147, 89 P.3d 726 (2004). *Drake* distinguished and clarified another neighborly courtesy case, *Kunkel v Fisher*, 106 Wn. App. 599, 23 P.3d 1128 (2001) (trial court had applied a presumption of neighborly courtesy), by noting significant evidence in the record in *Kunkel* regarding discussions about using the easement and the servient landowner giving permission to drive over the property. *Drake* at 194-95. There is no such evidence in this case.

The court in *Drake* found permissive use or neighborly accommodation did not apply because:

> [T]he driveway was the only existing access to the property, and it was located on the [servient] lot. There is no evidence that [dominant estate owner] asked for permission or received express consent either to use the driveway or to extend it onto his own property with a bulldozer. In addition, the record shows no relationship

> between [dominant estate owner] and the [servient estate owner] from which one could infer permissive use. Nor does it show any circumstance that suggests neighborly sufferance or acquiescence.

Drake at 154.

The facts in *Drake* are highly similar to the facts in this case: the Alley is the only access for the rear facing garage (1 RP 21, 25-26) and the Dumond family [dominant estate owner] did not ask for permission or receive consent to use the alley (Finding of Fact 13, CP 456, Line 11 (balance of Finding 13 is alleged error)). In this case, there is no evidence whatsoever in the record of any sort of relationship (e.g., familial, social, professional or otherwise) that would suggest or infer neighborly courtesy as the reason for the use of the Alley. Here, as in *Drake,* the Court should find the trial court erred by applying the neighborly courtesy doctrine.

Imrie v. Kelley, 160 Wn. App. 1, 5, 250 P.3d 1045, 1047 (2010) is distinguishable, but instructive here, because in *Imrie,* the entire alleged servient estate was fenced in and the road used by the alleged dominant estate was gated at both ends during the entire prescriptive period. By maintaining fences and gates throughout the entire prescriptive period in *Imrie,* the alleged servient estate was asserting ownership and control over the roadway for the entire time the alleged dominant estate was using it.

Thus the alleged dominant estate's use was actually permissive or a neighborly courtesy.

There is no such evidence here. No fence or gate was placed on Defendant Kelly or Defendant Church property for more than 35 years after the Dumonds and their predecessors in interest began using the alley.

Drake and *Imrie* clearly stand for the proposition that applying a neighborly courtesy exception must be supported by objective evidence other than being neighboring property owners. Even in cases where there are factors that might give rise to application of the neighborly courtesy doctrine, the facts must still actually support application of those exceptions. *See also*, *Lingvall v. Bartmess*, 97 Wn. App. 245, at 250-51, 982 P.2d 690 (1999) (rejecting the neighborly courtesy doctrine even though there was a family relationship between the parties, mutual use of the driveway by multiple individuals, and use that occurred on neighboring parcels of land, because of the existence of an actual acrimonious relationship between the two family members).

The record here contains nothing whatsoever to indicate neighborly courtesy facilitated the Dumonds' use of the alley. Instead, the trial record strongly supports the conclusion that there was a belief that a public right of way existed in the Alley. Finding 7, CP 456; 1 RP 37-39, 61 (Greg Dumond); 1 RP 92, 112 (Diane Dumond); 1 RP 116, 117

(Darlene Mundy); 1 RP 169 (Thomas Woolery); 1 RP 177- 178, 182-183 (Dr. Merritt Lawson in the year 2000); CP 410-411 (Robert Kahl in the year 2006). The record also includes substantial evidence of objective acts demonstrating the common belief the Alley was a public right of way, e.g., many homeowners building rear-facing garages, (Finding 8, CP 456), having garbage trucks travel up and down the alley (Finding 7, CP 456), operating a business with the only access to it being the Alley (1 RP 151-152), driving through the Alley even though the driver did not own property along the disputed Alley (1 RP 130). **Use of property pursuant to an erroneous belief that a public right of way exists is still adverse use.** *Dunbar v. Heinrich*, 95 Wn.2d 20, 622 P.2d 812 (1980) (prescriptive easement granted even though claimant drove on a road he believed was a public right-of-way which was actually private land).

The Trial Court's finding of a tacit agreement or use by neighborly accommodation (Finding 13, CP 457; Conclusion 3, CP 458) are inconsistent with the Trial Court's finding of use by property owners and non-owners as a public alley (Finding 7, CP 456). The Dumonds and all other property owners and non-property owners alike, who used the Alley under the mistaken belief it was a public right of way had no reason to make any overt declarations of hostility. Nor would they have any reason

to seek permission to use it. Believing the Alley to be a public right of way, they simply used it for their own purposes. It makes no sense to assert or conclude that the Dumonds, and at least eight other home owners in the Alley, built rear facing garages accessed by the Alley based upon nothing more than a tacit agreement to keep the Alley open. To suggest the Dumonds and others used the Alley by way of neighborly courtesy negates the overwhelming evidence that the Dumonds, and others, believed the Alley was a public right of way.

There was no testimony or other evidence adduced at trial to support the trial court's finding of a neighborly courtesy in this case. However, the vast weight of the evidence clearly supports the trial court's finding that use was that of a public alley. The finding that the use was by neighborly accommodation was therefore error.

II. THE TRIAL COURT ERRED BY CONCLUDING THAT THE DEFENDANTS ARE ENTITLED TO JUDGMENT SPECIFYING THEY HAVE CLEAR TITLE TO THE PROPERTY IN QUESTION, UNBURDENED BY ANY PRESCRIPTIVE EASEMENT, AND BY PERMENENTLY ENJOINING THE DUMONDS FROM FURTHER USE OF THE PROPERTY.

The record shows that the Dumonds satisfied all of the legal requirements to establish a prescriptive easement. Therefore, the trial court's issuance of a judgment clearing title in favor of the Defendants

and permanently enjoining the Dumonds from any further use of the property were error.

III. THE TRIAL COURT ERRED BY ASSESSING DAMAGES AGAINST GREGORY DUMOND FOR TEARING DOWN THE FENCES ERECTED BY DEFENDANTS ACROSS THE PROPERTY IN QUESTION.

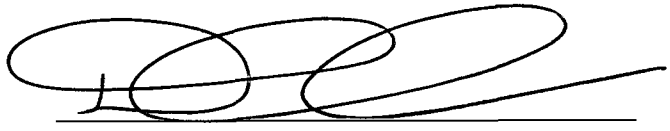
Gregory Dumond tore down fences erected across the Alley in 2008 and 2010. 1 RP 51, 63. This action was long after the prescriptive easement had ripened by virtue of the continual use in the 1960s through 1970s. 1 RP 26, 32 (constant vehicle traffic, clear tire ruts, no vegetation, from 1960 through at least 1978); CP 456 (Finding of Fact 7), 1 RP 32 (city use to collect garbage through 1960s and 1970s). Even though Kelly and the Church did not acquire their properties until 2003 (Church, Exhibit 7) and 2006 (Kelly, Ex. 1), both took their properties subject to the previously ripened prescriptive easement rights of the Dumonds. *Lee v. Lozier,* 88 Wn. App. 176, 186, 945 P.2d 214, (1997); *Northwest Cities Gas Co. v. Western Fuel Co. Inc., et al.,* 13 Wash.2d 75, 123 P.2d 771 (1942). Therefore, the Kelly and the Church had no right to erect the fences, and Gregory Dumond's removal of the fences was justified. The judgment for replacement costs should be vacated.

CONCLUSION

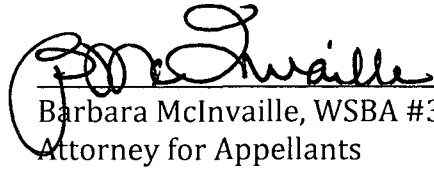
The Dumonds have satisfied each of the legal requirements to establish a prescriptive easement. The trial court erred by finding that their use of the property was permissive. The trial court should be reversed.

DATED this 29th day of November, 2012.

RESPECTFULLY SUBMITTED,



Daniel N. Cook, WSBA #34866
Attorney for Appellants



Barbara McInvaille, WSBA #32386
Attorney for Appellants

Declaration of Transmittal

I certify under penalty of perjury that on the 16th day of November 2012, I transmitted a copy of this document to via the method(s) designated below:

Stanley Rumbaugh Rumbaugh Rideout Adkins & Wallace PLLC 820 "A" Street Ste #220 PO Box 1156 Tacoma, WA 98401-1156.	Transmitted via: ☒ First-Class US Mail ☐ Facsimile to (253) 756-0355 ☒ Email to stan@rraw-law.com ☐ Legal Messenger for Hand Delivery

Dated at Lakewood, Washington this 28 day of November 2012.

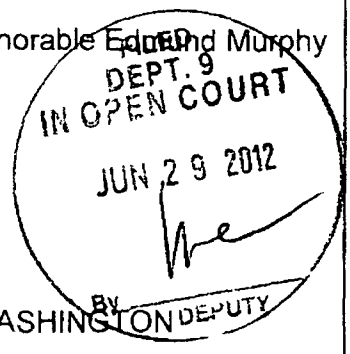
Sally J DuCharme

Sally DuCharme, Legal Assistant

APPENDIX A

Findings of Fact and Conclusions of Law

The Honorable Edmund Murphy



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

DIANE DUMOND, GREG DUMOND, and DARRELL DUMOND, single individuals, Plaintiffs, vs VIETNAMESE BAPTIST CHURCH OF TACOMA, INC , a Washington Corporation, and CHARLES L. KELLY, JR., and JANE DOE KELLY, as a Marital Community, Defendants.	NO 11-2-08201-1 FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CR 54

THIS MATTER having come before the Court for a bench trial, concluding April 16, 2012, and the Court having heard the testimony of the witnesses, having reviewed the deposition of Robert Kahl as substantive evidence, and the Court having further reviewed all of the exhibits admitted at trial and having heard the arguments of counsel, does hereby made the following Findings of Fact and Conclusions of Law.

I FINDINGS OF FACT

1 This action concerns a strip of land bounded on the north by South 60th Street and the south by South 62nd Street, and bounded to the east by Warner Street and to the West by Puget Sound Avenue in Tacoma, Pierce County, Washington The strip of land in question is on the western property line of the parcels abutting

ORIGINAL

RUMBAUGH RIDEOUT ADKINS & WALLACE, PLLC
820 A Street, Suite 220 • P O Box 1156
Tacoma, Washington 98401
Tacoma 253 756 0333 • Seattle 253 838 0309
Fax 253 756 0355

Warner Street, and on the eastern property line of the properties abutting Puget Sound Avenue.

2 Without making finding that the area in question constitutes an alley, for ease of reference, the area in question will be referred to as an alley.

3 Defendant Kelly's property is located at 6047 South Puget Sound Avenue, and Defendant Vietnamese Baptist Church of Tacoma's (hereinafter "the Church") property is located at 6042-6048 South Warner Street, Tacoma, Washington

4 Plaintiffs Dumond are the owners of a residential parcel of real property located at 6032 South Warner Street, Tacoma, Washington.

5 Between the Church property and Plaintiff Dumond's property, on the South Warner Street side, are properties owned by Meritt Lawson and Darlene Mundy.

6. Plaintiffs claim that approximately five and one-half feet along the western boundary of the Kelly property and approximately five and one-half feet along the eastern boundary of the church property is burdened with a prescriptive easement for the benefit of Plaintiffs, allowing them to access their rear facing garage.

7. In the 1960's and 1970's, and into the 1980's, many property owners all along the alley way made regular use of the strip of land in question by traveling upon it. During the same period of time, city garbage trucks used the alley on a weekly basis to collect garbage from neighbors along the entire alley To some degree, non-neighbors who owned no property in the alley treated the area of land in question as a public alley as well

8. In the 1960's and '70's as many as nine of the properties along the disputed strip of land had driveways and garages that opened and accessed the alley.

9 The neighboring blocks have dedicated alleys which appear, on aerial view, largely the same as the alley in question

RUMBAUGH RIDEOUT ADKINS & WALLACE, PLLC
820 A Street, Suite 220 • P O Box 1156
Tacoma, Washington 98401
Tacoma 253 756 0333 • Seattle 253 838 0309
Fax 253 756 0355

10. The official recorded plat of the area in question shows the back property line of the properties located along South Puget Sound Avenue and Warner Street to abut each other, and no alley is dedicated in the official plat map

11. Over the period of time beginning in the late 1980's or early 1990's, use of the alley diminished The record establishes that the Dumond's are now the only property owners who actually seek to use the alley in question as an access to their rear facing garage All other property owners along the alley way stopped using the alley as an access to their rear facing garages over the years .

12. To permit Plaintiffs Dumond to continue to use the alley in question for access to their rear facing garage, the property of Defendant Kelly and Defendant Vietnamese Baptist Church of Tacoma would be burdened

13 No permission was expressly asked or given among the neighbors for the use of the alley way, however the use by Plaintiffs and Plaintiffs' predecessors in interest was based upon a tacit agreement among the effected property owners. The agreement was to keep the alley open for use by the property owners whose property abuts the alley, and other non-property owners who sporadically utilized the alley.

14. In the year 2006, the properties to the north of the properties owned by the parties to this action blocked access to the alley

15 In 2007, Defendants Kelly and the Church erected fences to the edge of their property lines This fencing blocked access to the strip of land in question.

16. The Plaintiffs use of the property in question was open and notorious It took place over a uniform route, and was continuous and uninterrupted for a period of at least ten years. The use by Plaintiffs or their predecessors in interest was being exercised with the knowledge of Defendants, or their predecessors in interest, at a time when Defendants or their predecessors in interest were able to assert their rights.

RUMBAUGH RIDEOUT ADKINS & WALLACE, PLLC
820 A Street, Suite 220 • P O Box 1156
Tacoma, Washington 98401
Tacoma 253 756 0333 • Seattle 253 838 0309
Fax 253 756 0355

17. In the year 2010, over the objection of representatives from the Defendant Church, Plaintiff Gregory Dumond tore down the fences erected in the alley way by Defendants Kelly and Defendant Vietnamese Baptist Church of Tacoma. Plaintiff Dumond knew at the time he took the fences down that the area was not a public alley. Defendant Kelly had no notice or knowledge of Plaintiff Gregory Dumond's tearing down of the Kelly Fence until after the fact

18 That the cost of repair of Defendant Kelly's fence is $1,311.30, and the cost of repair of the Defendant Vietnamese Baptist Church of Tacoma's fence is $1,630.50. In the event the same contractor is used to repair both fences, a ten percent discount, totaling $294 18 can be obtained

II CONCLUSIONS OF LAW

1 The Court has jurisdiction of the parties, and over the real property which is the subject of this dispute

2. Plaintiffs Dumond have failed to satisfy the statutory requirements of prescriptive easement acquisition, in that the prior use by the Plaintiffs' or their predecessors in interest of the alley way in question was not hostile, or legally adverse to the Defendant owners of land, or their predecessors in interest. Until the year 2006, prior use of the alley way by Plaintiffs and Plaintiffs' predecessors in interest was by express or implied permission

3. That prior to 2006, the use of the property in question was permissive in nature by neighborly courtesy and understanding.

4 In 2006 for the first time, blocked access created by fences built to the south of the parties' property resulted in a circumstance which would result in a finding that the alley use was adverse of use to the owners of the land sought to be burdened by a prescriptive rights claim. The erection of the fence blocking the alley way in 2006

RUMBAUGH RIDEOUT ADKINS & WALLACE, PLLC
820 A Street, Suite 220 • P O Box 1156
Tacoma, Washington 98401
Tacoma 253 756 0333 • Seattle 253 838 0309
Fax 253 756 0355

was the first action which created a circumstances where the use of the property in question would be considered hostile to the owner of the land to be burdened

5. Defendant's action of building fences in 2007 created, for the first time, a condition on the land that where further use by Plaintiff would be considered hostile to the interests of Defendants, whose property is sought to be burdened with Plaintiff's claim of prescriptive rights.

6. Defendants are entitled to judgment specifying that they have clear title to the property in question, unburdened by any prescriptive easement.

7 Plaintiffs are permanently enjoined from further use of the property in question for access and egress to their property

DONE IN OPEN COURT this 27th day of June, 2012.

Judge Edmund Murphy

FILED
DEPT. 9
IN OPEN COURT
JUN 29 2012
BY DEPUTY

Presented by

RUMBAUGH RIDEOUT ADKINS & WALLACE, PLLC

Stanley J. Rumbaugh, WSBA #8980
Attorney for Defendants

Approved as to form,
Notice of presentation waived

FAUBION, REEDER, FRALEY & COOK, P.S.

Daniel N. Cook, WSBA #34866
Attorney for Plaintiffs

RUMBAUGH RIDEOUT ADKINS & WALLACE, PLLC
820 A Street, Suite 220 • P O Box 1156
Tacoma, Washington 98401
Tacoma 253 756 0333 • Seattle 253 838 0309
Fax 253 756 0355